SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1938

No. 177

J.W. KOHN, M. S. KOHN and J.W. KOHN, Administrators of the Estate of Carrie Kohn, Deceased,

Appellants.

vs.

CENTRAL DISTRIBUTING COMPANY, INC., and THE COMMONWEALTH OF KENTUCKY, ETC., et al,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Filed July 5th, 1938

(The letters TR refer to the Transcript of Record)

BRIEF FOR APPELLANTS

HARVEY H. SMITH, Attorney,
SMITH & SCHUBERTH, Counsel,
WILLIAM A. SCHUBERTH, Counsel.
Counsel for Appellants.

REFERENCE INDEX

The Appellants assail the Constitutionality of the Act, "Kentucky Alcohol Control Act", effective March 7th, 1934.

Appellants assail the Constitutionality of the Whiskey Tax Law, effective April 9th, 1936.

These Acts are assailed under the authority of section 266 of the U. S. Compiled Laws.

These sections which impose the tax are found in the Kentucky Statutes (Carroll's) in the following sections:

Page 2259,

Section 4281c-4 (providing for the $1.04 per gallon tax.)
Section 4281c-6 (import taxes.)
Section 4281c-5 (providing that the wholesaler pay the tax.)
4105 and 4106 provide for assessment and valuation.
4214a-13 the manufacturers tax.
4265 provides the Commonwealth is not liable for costs.
4214d-10 provide for sworn assessment.
4214a-16 a provision concerning imports.
4214a-17 also refers to imports.

The enforcement of said Acts constitute official oppression of Appellants by officials of Kentucky in violation of the 14th Amendment to the Constitution of the United States, and the equal protection laws clause of the United States.

These statutes are not printed in this brief nor in the Appendix but the sections assailed are quoted herein: the entire Acts may be found in the Record in full—the Green Book, 1934 Act and the Blue Book, the 1936 Act. Also Amendment 7 of the Constitution of the State of Kentucky is quoted, relied upon as voiding both of these Acts

Assignment of Errors is printed in full in the statement of Jurisdiction. (Included in POINTS argued).

The Act of April 7, 1938—House Bill 129, designated as Kentucky State Alcoholic Beverage Control Law, section 122, repeals Chapter, 146, Acts of the General Assembly of 1934, which repeal section is printed in the Appendix, showing that the 1934 Act in so far as pertinent here is repealed.

Statement of jurisdiction need not be repeated here, and may be found on the printed statement on jurisdiction.

INDEX TO BRIEF FOR APPELLANTS:

Page

FEDERAL STATUTES

Judicial Code, Sec 266.
Feb. 13, 1925, C. 229, Sec. 143.
Statutes 938, (28 U. S. C. A. 380).
Sec. 380, Title 28 of U. S. Code.
Annotated.
Sec. 14, Judicial Code U. S. C. A. — Sec. 41, Sub. 13.
Sec. 266 Judicial Code as Amended by Act of 1925.
Sec. 28 to 39 of the Judicial Code.
28 U. S. C. A., sections 71-82.
Judicial Code (Act of March 3, 1911, Chap. 231).
Art. 1, Sec. 8 Constitution U. S. and Carmack Amendment.
Art. 1, Sec. 2 and Article 3, Sec. 2, 14th Amendment Constitution of the U. S.

STATUTES CITED: (State) of Kentucky.

Kentucky Control Act 1934
Kentucky Tax Act 1936
Kentucky Control Act 1938. See Kentucky Statutes—1937.
Constitution of Kentucky, Sections 171, 172, 174, 181.
59, sub. 29, Bill of Rights, 3 and 10, 26, 27. Amendment 7, Section 175 Prohibiting extension of exemptions in taxes, 51, 135, 109, 19, 125, 126, 182, 28, 155.
Applicab'e Statutes: (Kentucky)
(Carroll's Statutes) Sec. 2306-2307.
976, Section 4260c, 4261, 4022, 3670 sub 10.
4028, 4029, 2524, 72, Act of 1906, Chap. 22.
Carroll's Code
63, 72, Criminal Code sec. 11.
118, 70, 71, 73, 75, 66, 732, 52 (72 and 63 are jurisdiction provisions) 379, 380, 732, 738. See, Transcript of Record. printed.)
See Transcript of Record (not printed) for Act 1934-1936 (not printed) and Assignment of Errors (printed T. R.)
Carmack Amendment Act, June 29, 1906 Stat. 34, 593.
Assignment of Errors from 1 to 11 include all of the points argued, and are not specifically referred to for that reason.

I

FEDERAL AND STATE CITATIONS

A.
Alabama R. R. Co. vs. American Cotton Oil Co., 229 Fed. 11, 18.
Asher vs. State of Texas, 100 U. S., 339; 128 U. S. 129.
Arkansas & Louisiana Pipe Line Co. vs. Coverdale, 20 Supp., 676.

B.
Brady vs. Bannon, 134 Ky., 769.
Baldwin vs. Seelig, 294 U. S., 516.
Board of Penn. Com. vs. Spencer, 159 Ky., 255.
Bushaber vs. Union Pac. R. R., 240 U. S., 1 to 5.
Bradshaw vs. Bowden, 226 Federal, 327.

C.
Cumberland Tel. Co. vs. Hopkins, 121 Ky., 850.
Com. of Ky. vs. Walsh's Trustees, 133 Ky., 112.
Clark Distilling Co. vs. Western Maryland Ry. Co., 242 U. S., 311.
Commonwealth vs. Long, 30 S. W., 629 (Court of Appeals of Ky.)
Commonwealth vs. Grand Central Bldg. & Loan Ass'n, 30 S. W., 628 (Court of Appeals of Ky.)
Cooley Vol. 1, 394.
Commonwealth vs. Kinnaird, 18 Ky. Reporter, 647.
Cogar vs. Wright, 78 Ky., 59.
Claybrook vs. City of Owensboro, 16 Fed., 297.
Commonwealth vs. Louisville Gas Co., 122 U. S. S. W., 164.
Casey vs. Newport Mill Co., 156 Ky., 623.
Craig vs. Renaker, 201 Ky., 582
Coe vs. Errol, 116 U. S., 517.
Cavanaugh vs. Looney, 248 U. S., 453.
Cowley vs. Railroad, 159 U. S., 569.
Carson vs. Petroleum Co., 249 U. S., 95.
Crutcher vs. Kentucky, 141 U. S., 47.
California vs. So. Pac., 157 U. S., 269.
City of Knoxville vs. Southern Com. Co., 220 Fed., 236.
Cumberland Tel. Co. vs. Hopkins, 121 Ky., 850.
Commonwealth vs. So. Pac. Co., 150 Ky., 97.
Commonwealth vs. Taylor, 101 Ky., 325.
City of Louisville vs. Poo'ey, 136 Ky., 286.
Colgate vs. Harvey, 296 U. S., 404.
C. & G. Co. vs. Harris, 235 U. S., 292.
C. & O. Ry. Co. vs. Gibson Co., 25 Federal (2nd) 215.
Central & Georgia R. Co. vs. Wright, 207 U. S.. 127.
Campbell Co. vs. City Newport, 174 Ky., 712.
Central R. R. vs. Wright, 207 U. S., 127.

D.
Duncan vs. Griswold, 92 Ky. 546.
Dawson vs. Ky. Distilleries, 255 U. S., 288.
Dugan vs. Bridges, 16 Supp. (Fed.) 634 and 700.

E.
Ex Parte Young, 209 U. S., 123.
Ex Parte Virginia, 100 U. S., 339.
Ex Parte Buder, 271 U. S., 461 — 13 Fed. (2) 1007.

F.
First National Bank vs. Sanders Bros., 162 Ky., 374.
Freiberg J. and A.), 255 U. S., 288.
Freiberg vs. Dawson, 274 Federal, 255, 420, 430.
Furst vs. Brewster, 282 U. S., 493.
Farmer's Grain Co., 268 U. S., 189.
Fontenot vs. Arcado, 278 Fed., 875.

G.
Greene vs. L. & I. Ry. Co., 244 U. S. 499.
Gates vs. Barrett, 79 Ky, 295.
Gudger vs. U. S., 249 U. S., 373.
Glenn vs. Field Packing Co., 290 U. S. 177.
Green vs. Page, 9 Fed. Supp., 847.

H.
House vs. Bank of Lewisport Bank, 198 S. W., 762? (Kentucky cas
Hall vs. Grogan, 78 Ky. (Kentucky case).
Home Telephone Co. vs. City of Los Angeles, 227 U. S., 278.
Hughes vs. Hardesty, 3 Bush, 364.
Hagar vs. Walker, 128 Ky., 1.
Hegley vs. Henderson Co., 107 Ky., 414.
Hodge vs. Cincinnati, 28 U. S., 335.
Hennington vs. Georgia, 163 U. S., 166, 299.
Holtzauer vs. City of Newport, 94 Ky., 396.
Hiner vs. Donnan, 285 U. S., 312.
Highland Farms Dairy vs. Agnew, 16 Supp., 575.
Hunter vs. Conrad, 85 Federal,, 803.

J.
James vs. Helm, Auditor, 129 Ky., 239.

K.
Keller vs. Stanley, 86 Ky., 240.
Kennington vs. Palmer, 255 U. S. 100, 65 Law Edition, 528.
Kidd vs. Pearson, 128 U. S., 1-20-32.
Kentucky vs. Caleb Powers, 201 U. S., 1.

L.
L. & N. R. R. Co. vs. Commonwealth, 104 Ky. Reporter, 735.
Lewis vs. Foster, 1 New Hampshire.
Louisvil'e Tobacco Warehouse Co. vs. Commonwealth, 106 Ky., 165.
L. & N. R. R. vs. Eubanks, 184 U. S. 27; 58 Supreme Court (L.Ed.) 9
L. & N. R. R. Co. vs. F. W. Cook Brewing Co., 223 U. S., 568.
L. & N. R. R. Co. vs. Greenbrier Dist'g. Co., 170 Ky., 775.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 177

J.W. KOHN, M. S. KOHN and J.W. KOHN, Administrators of the Estate of Carrie Kohn, Deceased,

Appellants,

vs.

CENTRAL DISTRIBUTING COMPANY, INC., and THE COMMONWEALTH OF KENTUCKY, ETC., et al,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Filed July 5th, 1938

(The letters TR refer to the Transcript of Record)

BRIEF FOR APPELLANTS

May It Please The Court:

STATEMENT:

To the Honorable Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

The three-judge court of the district court of the United States for the Eastern District of Kentucky, sustained appel-

lee's motion to dismiss appellants amended bill in equity for injunctive relief, and this is the immediate issue before this court although we discuss other questions which we think form a relative basis of this complaint.

Involved in this controversy are three acts of the Kentucky Legislature. Kentucky Alcohol Control Act, enacted by the General Assembly of Kentucky and effective March 17, 1934; and the Kentucky Alcoholic Beverage Tax Law, effective April 30, 1936; and the Kentucky State Alcoholic Beverage Control Act, enacted March 7, 1938. The constitutionality of these Acts constitute, with the oppression of state officers the basis of the equity action for injunctive relief.

We raise, and argue the questions in the order they appear to us, with the question in each issue, and quote, "is there an adequate remedy at law; and was there an issue presented of jurisdiction to the three-judge court, and did the amended bill of Appellants state a cause of action to said court, and was it the duty of said court to consider all of the issues made by said court on the record, or did said court commit error in dismissing said bill on the grounds alone, that the Appellant had an adequate remedy by suit to collect taxes due or not due, to the Appellants which had been paid by its mortgagor, the Central Distributing Company, to the Commonwealth of Kentucky?

Brief Statement of Fact

The Central Distributing Company is a Kentucky corporation, at all times engaged in the wholesale distribution of liquor, licensed under the Act of the Legislature of 1934 which Act was passed by the Legislature of Kentucky immediately after the repeal of the 18th Amendment but before the repeal of a similar amendment to the Constitution of Kentucky, Amendment 7. This amendment is section 226a as follows, found at page 19 and 12 af the transcript of the record, and the important part reading: "The manufacture, sale, transportation of spirituous, vinous, malt or other intoxication liquors, — is hereby prohibited.

The Appellants held a chattel mortgage on cases of whiskey and the equipment and furniture of the Central Distributing Company, then a licensee under the 1934 Act of the Legislature of Kentucky and before the repeal of the 7th Amendment of the Kentucky Constitution, which Act the Central Distributing Company, perhaps, may not complain of, but which these Appellants, mortgagees may. This mortgage indebtedness, at said time was overdue and amounted to approximately thirty-one hundred ($3100) dollars and over as alleged in appellants petitions, paragraph 3 page 4, (TR).

A supplemental license tax was attempted to be passed in 1936, levying a tax of $1.04 per gallon on all whiskey sold in the state, and a 5 cent per gallon tax, levied on imported whiskey, per gallon. The plan, in order to evade the Constitution, was to require the importer to purchase import privilege stamps, the state called them.

On February 16th, 1938, the state, issued an attachment out of the Franklin Circuit Court of Kentucky, which was not the place of business of Central Distributing Company nor the place or residence of its service agent, both being in Campbell County, Kentucky: Appellee, Central Distributing Company, claiming no such suit or incidental attachment could be brought there under the Constitution and laws of Kentucky, against it. Section 72, Carrolls Code of Kentucky, controlling jurisdiction of said suit.

They seized the business, and all assets of Central Distributing Company, locked its place of business, and later removed the merchandise of the corporation, all of which happened while the Appellants were in process of foreclosing their mortgage, duly recorded before the suit was brought or attachment issued.

The attachment was served on no officer of the Company or on the service agent of it, but on the Manager of these Appellants, Harry Bayer, paragraph 4 page 5, (TR). All of the furniture and equipment in a few days were removed from the building where located.

Thereupon the appellants on April 11, 1938, filed their amended petition, and prior thereto it had filed its original petition and made service thereon.

They asked the Eastern District Court for a temporary and permanent injunction, and moved for reference to the three-judge court, which motion was denied, and then appellants appealed to the Circuit Court of Appeals for the 6th Circuit, for a reversal of this order, pending which, by agreement of the appellants to dismiss said application, the district court reversed the previous judgment, and the cause stood for hearing on its order before the three-judge court on the issue of injunctive relief. Prior, however, the appellants made their motion for a judgment on their amended petition, April 11, 1938, the date of the filing of their original petition being February 28, 1938. Service was acknowledged by appellees attorneys of brief after service of the summons which service was on the 25th day of February, and thereupon the court ordered the filing of said motion for judgment (TR) page 16.

The motion for judgment was made on April 11, 1938 (TR) page 27. The motion so made was for judgment as by confession and default, and on this motion appellants introduced evidence by affidavits (Page 20 TR), inclusive, and to and including of page 27 (TR). The appellees offered no evidence and made no answer, until the cause was moved to the three-judge court, and on the 16th of April, they filed their motion to dismiss, pending the argument, the district court having denied appellants motion for a judgment on the amended petition—exceptions taken.

The motion carried with it a confession of the issue of jurisdiction, and the facts alleged in the petition, so that when the three-judge court assembled, they had but one question to decide, that of jurisdiction, and the jurisdiction of the district court; but the three-judge court sustained appellees motion to dismiss on the ground that no right was shown for injunctive relief and that the appellants had an adequate remedy under section 12 of the act of 1934 which appellants claim was a void statute altogether, and had been repealed, that the Legislature of Kentucky under the

7th Amendment to the Constitution of Kentucky, above cited, had no authority to enact a beverage statute.

In the meantime the Alcohol Beverage Board had cited the Central Distributing Company to appear before the appellees, J. W. Martin, and the said board, to hear if its license, under the Act of 1934 should not or should be revoked. It had such hearing and did revoke said license, disregarding all of the defenses made by the licensee. The Act of 1934, the terms of which it enforced had been repealed, which repeal they held as immaterial, but appellants contended that the said Hageman who acted under it, page 24 (TR), had been legislated out of office. The Board thereupon attempted on April 5th, 1938, after the enactment of March 7th, 1938 Law hereinbefore designated, and which became effective after the repeal of the Amendment 7 of the Kentucky Constitution, to rehash the charges made by Hageman under the new Act of March 7th, 1938, (TR page 26) known as the Kentucky State Alcohol Beverage Control Act. The April 16th motion filed by appellees was sustained on the date of its filing, and an order made on said date dismissing appellants petition, and an order allowing appeal: Appellants on the same day filed their Assignment of Errors, page 30 (TR), served it on the executive officers of the state with notice.

Rule 8, subdivision D, of the Act of June 19, 1934, may not be controlling of this action, but it is in substance the same as the law at the time of the filing of this action in the United States District Court under the law then existing averments undenied are admitted, section 114 of Carrolls; Kentucky Code provides, that parties must move before trial, for a material issue concerning each cause of controversy; and it is the duty of the court upon or without motion, to compel them to do so; and, for that purpose, they may be required to reform their pleadings or the pleading of a party who is in fault may be stricken from the case. At section 110, inclusive of section 139, govern the practice and pleading in such case and the demurrer or motion or answer may be filed in any case. If no answer or pleading is filed in 20 days, then such party is in default, section 142.

(10 days after summons in the county) section 3670-10, Carrolls Code (Fed Rule 12).

The appellees therefore, under the state practice and under the federal practice were in default when appellants filed their motion for judgment. It is true that the court had the discretion to extend the time, but was not asked to do so. The motion for judgment should have been sustained. Section 379-380 Kentucky Codes. Rules 12 and 65,-U. S.

Therefore, there was nothing before the three-judge court except the question, "does the petition of the appellants state a cause of action, for jurisdiction?"

This petition was undenied by appellee but assuming the court might examine that question, on their own motion, there was no ground for dismissal and the court did not base their order of dismissal on any other ground alleged in appellants petition, except that the appellants had an adequate remedy by law to collect illegal tax. They found the court had jurisdiction by assuming dismissal, but that the appellants had a remedy for recovery by suit for taxes paid. This ruling also applied to the Central Distributing Company had it been a plaintiff, but it was not asking for relief, being an uninterested defendant, and a nominal party to the litigation.

General Argument

The petition showed clearly, that between the defendants, they had the property which did secure the appellants note and this was admitted. The record did show at that time that there was no pleading filed by appellees in the Eastern District Court of Kentucky when the cause was submitted to the three-judge court and we think that no order of dismissal of this court could be entertained. It might refer the case back to the district court with an order that no constitutional questions were involved, but it could not make an order on the merits of the cause, or permit any pleading to be filed before them, deciding the case on the record as they found it. They narrowed their decision to one question—remedy to collect tax.

It is clear from the facts that the Franklin Circuit Court where the appellees had appeared, had no jurisdiction to sustain the attachment as there was not a single denial of record to this allegation. The petition alleged that the appellees had over nine thousand dollars of tax money collected from the mortgagor for importation of liquors to Kentucky which, under the laws of Kentucky, was the property of these appellants. So in any event, being residents of Ohio, and the defandants, both being citizens of Kentucky, and it being admitted that more than three thousand dollars was involved in the litigation, there was but one order the court could make, send the case back to the district court for trial, if the pleadings had been denied, there to determine the issues, and allow the district judge to make up the issues, or enter judgment themselves on the undenied equity issues. They may or may not have had this power and certainly the district court had no less power, over the objection of the appellants, and properly should have received the case and ordered the common-law issues to a jury.

But it is our opinion, without discussing any questions arising under the petition affecting laws which control the action and under the Constitution of the United States that there was no issue left, as a matter of fact, only to determining the amount of appellants recovery, at common law, which of course depended upon proof before a jury, inasmuch as a jury trial had not been waived.

There also was the mortgage lien, in the amount due thereunder, the amount of import taxes, which appellants under the issues had due to them and the amount of unlawful consumers tax which were taken away from their mortgagor. Then there was the further question as to whether the revenue commissioner had authority to seize property, and all other questions of fact that stood for debate, the questions of law being admitted by the default in pleading.

The ground upon which the court dismissed the action was no legal ground of dismissal insofar as issues were concerned arising under the laws of Kentucky, and there

was no other issue arising except under Article I section 8 of the Constitution of the United States.

By the stretch of the imagination only could injunctive relief be denied on the face of the record.

Statutatory Right vs. Order of Dismissal

The 14th section of the judicial Code provides for original jurisdiction in such cases; 28 U. S. C. A. section 41. (13).

> "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under the color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or by any right secured by any law of the United States, providing for equal rights of the citizens of the United States, or of all persons within the jurisdiction of the United States."

This clause refers to personal rights as well as property rights, and therefore the right of the appellants to foreclose their mortgage for a money loan to a citizen, corporation of Kentucky, is involving a law of the United States and the construction of which may dispose of the case. The right to sue in a federal court where the amount and diversity exists is another right of a citizen of the United States, which cannot be disposed of without a determination of the issues, and cannot be disposed of by an order of dismissal.

Where a court takes control of the property of a foreign citizen and seeks to confiscate it, the property right is secured by federal law and the Constitution of the United States; and this situation presents a complete issue of due process. Where a court or other state official seized property of a foreign citizen with no jurisdictional right, or acts under an invalid law, or a law that has been repealed, a right under the United States Constitution has been presented.

We have already cited a full line of authorities on the question of the jurisdiction of this court in the statement on jurisdiction, and these authorities will be omitted.

In Carrolls Code of Kentucky section 379-80, it is provided that judgment may be entered on the pleadings when the allegations are undenied and where every fact pleaded stands admitted, if a cause of action in law is pleaded. In other words, if a judgment on an undenied petition can be rendered it may not be set aside, except for causes enumerated of unavoidable casualty.

We conclude, and it is apparent, that the recovery of the taxes was only one of the issues in the case, but even on that issue, made by the amended petition, if the three-judge court took a proper view, they could not sustain a motion for dismissal, on the question of taxes alone, or on any or all of the questions, unless therefore we assume they have such general authority as to determine questions of law and fact.

Argument 1, Point 13

Point 13, is suggested for support of this argument. It was set-up as a ground, that the import taxes owing to the mortgagor, and assigned to these appellants, amounted to more than the taxes claimed by appellees, and in point 7 we have alleged that these taxes were collected in violation of section 8, Article I, of the Constitution of the United States; and the amount of nine thousand dollars was therefore, an admitted amount under the state of the pleading. The allegation is, "having in its possession in excess of nine thousand dollars of money".

In point 8 at page 38 (TR), appellants again raised the same question, that these taxes were due the mortgagor on which appellants had a mortgage as this money in part was produced from the mortgage property and the business.

This import tax is concededly illegal, as set out in point 11 at page 38 (TR) where appellants show by the language of the Court of Appeals, and where the issue was presented, that, "injunction to prevent collection of an illegal tax is

the only adequate remedy." This decision, as Kentucky law, was binding on the three-judge court when the question of the legality of these taxes was raised. If these taxes were illegal, as the records show, by admission of Appellees, then on this issue, appellants were entitled to judgment.

Now whiskey is defined as property by the statutes of Kentucky, section 4022, (Carrolls).

And in Brady vs. Bannon 134 Kentucky, page 769, same question was determined favorable to this contention.

This question was therefore an issue before the court, as was also the consumers taxes due, set out in point 14, on which ground the court apparently decided to sustain a dismissal of appellants petition. The three-judge court could not segregate any issue, and ignore others, and especially where the other questions were of equal importance. If the motion for dismissal is to have the force and effect of a demurrer the petition must be sustained, for a cause of action, and we therefore see the error of the court in singling out one issue.

The fact, as shown by the state of the record, that the appellees were trying to destroy the business of the licensee, on the specious ground of an illegal tax, made it necessary for the three-judge court to determine whether the tax was legal or illegal. If it was illegal then there was clear evidence that the injunction must issue. At page 24 (TR), and also at page 26, there is ample proof that both administrators intended actually to destroy the business of the corporation.

There, it is plain, that a charge against the licensee was to be used as the grounds of revocation that foreign citizens who, come, we may assume were licensed to do business, from a wet or monopoly state, were required to disclose their destination. even though it is admitted they were not selling liquor in Kentucky; and this was done in spite of the fact known to the appellees that they were burdening interstate commerce. No valid taxes could be collected on such transactions. This shows the state's intention to op-

press the business because the attachment had already been levied and no summons had been served on the corporation.

See section 3, of the charges at page 26 (TR).

Section 4, of the same charges showed conclusively that the mortgagor or corporation was to be prosecuted by a state officer for the non-purchase of stamps via the rule of a valid import tax license—a clear burden on commerce between the states. Therefore there was no adequate remedy by suit to collect taxes to prevent this arbitrary abuse of power. This allegation was admitted under the state of the Pleadings.

Under no circumstances could the right of injunction be overlooked where the basis of invoking it was the demand for the payment of illegal tax. This is the federal law and the universal decisions made by the court of Appeals of Kentucky.

Argument 2, Point 2

The Franklin Circuit Court issuing an attachment, was without jurisdiction of the subject matter, and the attaching order of that court took appellants property without due process, and section 266, Judicial Code, provides for injunctive relief in such cases by the federal court, and such relief is based on the denial of due process under the 14th amendment to the Constitution of the United States by exercise of power under illegal statute.

Section 72 of the Code of Civil Practice of Kentucky provides specifically for the jurisdiction of the Circuit Courts of Kentucky in corporation cases to be at the place of business of the corporation or in the county where the service agent resides which in this case was Campbell County, the place of both, and not in Franklin County.

The Act of 1936 and the Act of March 7, 1938, provide for a fine and imprisonment for the offense charged by the Alcohol Board and the Revenue agent Hageman. This charge is for selling liquor in Kentucky when tax stamps were not attached. Either fine or imprisonment might be

imposed. The offense was not in the refusal to pay the tax but in selling the liquor in Campbell County where the offense was committed. Therefore the Act out of which the offense grew, and on which the attachment was based, occurred in Campbell County, and the suit would have to come under the terms of Section 72 of the Civil Code of Practice (Carrolls) "Excepting the actions mentioned in sections 62 and 66, both inclusive, and in sections 68, 70, 71, 73, 75, and 77, an action against a corporation which has an office or place of business in this State, or a chief officer or agent residing in this State, must be brought in the county in which such office or place of business is situated, or in which such officer or agent resides; or if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or, if it be for a tort, in the first-named county, or the county in which the tort is committed . . . (Who is "chief officer," section 732. Meaning of "resides," section 732. Service of Summons on, section 52)" (Carroll s Code).

The meaning of residence is defined in section 732 as the office of the place of business, and chief officer is defined as the chief officer or agent of the corporation, first, its President; second, its Vice-President; third, its Secretary or Librarian; fourth, its Cashier or Treasurer; fifth, its Clerk; sixth, its Managing Agent. The service of summons or attachment order was not served on either. This under the decisions in Kentucky, was a ground of injunctive relief, and this is admitted on the record before the three-judge court, as the pleading stood.

This above section, fixes the venue of the action, but if it did not exist, the place of the suit was in Campbell County by virtue of section 63 of the Code of Practice, Exhibit A, page 1 (TR).

We quote: "Actions must be brought in the county where the cause of action comes or some part thereof arose—Fine penalty, or forfeiture of recovery—For the recovery of a fine, penalty or forfeiture, imposed by statute and so forth."

This lack of jurisdiction occurred to the three-judge court on the reading of appellants amended petition.

Now the statute which it is alleged gave super-jurisdiction to the Franklin Circuit Court is 976 Carrolls Statutes (Exhibit B) page 1 (TR).

We quote: "Against Clerks of courts, collectors of public money, and all public debtors and defaulters, and others claiming under them.."

The Central Distributing Company was not a **public** dedefaulter, because it held no public office, but it is a private debtor, if anything, and not a public debtor. The word **"public"** refers to a public agency of the state, as it was the aim of the statute to give jurisdiction in this class of cases to the Franklin Circuit Court to enforce public obligations to the state by public officials.

This is proven by section 11 of the Criminal Code of Procedure (Carrolls), which says "That actions for penalties, may be brought as a civil action", but this section does not abrogate the Code provisions where offenses are committed the penalties must be enforced there, as provided under section 63, because some part of the action arose where the offense was committed.

Both sections 72 and 63 are jurisdictional statutes, fixing the place where suits must be brought, and the record shows that the Central Distributing Company had its place of business in Campbell County, and if it sold liquors without stamps to local buyers, for use and delivery in Kentucky then the Circuit Court in Campbell County alone had jurisdiction. The officer served, as alleged in the petition, was not an officer of the company.

The decisions: (Kentucky Court of Appeals and Federal), James vs. Helm, Auditor, 129 Kentucky, page 239.

"Not only has our court held that a prosecution for enforcement of a penalty for violation of a statute where imprisonment is imposed is not a civil action but other jurisdictions as well as here, have, with a degree of uniformity, held the same."

In Commonwealth vs. Long, 30 S. W. 629 (Court of Appeals of Kentucky) said: "Jurisdiction could not be maintained in Franklin Circuit Court where penalties were sought to be enforced, just decided by this court".

In the case of Commonwealth vs. Grand Central Building and Loan Association, 30 S. W., page 628, it is said that an action to collect penalties is without the jurisdiction of the Franklin Circuit Court.

The same pronouncement was made by the Supreme Court of the United States in No. 15,043, where it is held that an imprisonment statute must be enforced where the offense took place, and such is the general holding of the Court of Appeals in the following cases:

Morrell vs. Commonwealth, 129 Kentucky, 740;
L and N Railroad Company vs. Commonwealth, 104 Kentucky Reporter, 735;
McBride vs. Commonwealth, 4 Bush, 331;
Commonwealth vs. Kinnaird, 18 Kentucky Reporter, 647;
Terry vs. Commonwealth, 104 Kentucky, 726;
House vs. Bank of Lewisport Bank, 198 S. W. 762 (Kentucky case).

The petition of the plaintiff must show that the county where the action was brought is within the provisions of the Code of Practice, otherwise Jurisdiction may be raised by an answer, as provided in section 118 of the Code of Civil Practice (Carrolls):

Pennacle vs. Simpson, 216 Kentucky 187;
Rice vs. Kelly, 226 Kentucky 346.

There was no Summons served on an officer of the company and the order of attachment was not served on any officer of the company, and therefore no petition was filed before or at the commencement of the attachment.

The filing of a petition and a service of Summons is the commencement of an action, and an attachment cannot be

filed until an action has begun, and these requirements cannot be waived.

Duncan vs. Griswold, 92 Kentucky 546.

If the writ of attachment is procured without grounds or jurisdiction it will be discharged before judgment.

First National Bank vs. Sanders Bros., 162 Kentucky 374;
Peters vs. Conway, 4th Bush 565;
Hall vs. Grogan, 78 Kentucky page 11;
Keller vs. Stanley, 86 Kentucky page 240;
Redwine vs. Underwood, 101 Kentucky page 190.

Thus there was no jurisdiction in the Franklin Circuit Court, issuing the attachment, no service of a Summons or legal attachment, and no proper hearing to assess the taxes by any statutory authorized agency, hence the property was seized by the Sheriff of Campbell County and the appellees without legal right or authority; and in such case injunction is the proper remedy, and such seizure was made in violation of the 14th amendment.

A petition filed must affirmatively show, where remedy is sought. to be enforced, that it is done in the manner prescribed by law, or there is not due process.

Shawhan vs. Zinn, Kentucky Opinions June 1881;
Cogar vs. Wright, 78 Kentucky 59;
McAllister vs. Savings Bank, 80 Kentucky 685;

Section 266 of the Judicial Code as Amended by Act of 1925;

Sections 28 to 39 of the Judicial Code 28 USCA—sections 71 to 82;

Home Telephone Company vs. City of Los Angeles, 227 US—page 278;
Ross vs. State of Oregon, 227 U. S. 150;
J. and A. Frieberg, 255 U. S. 288;
Claybrook vs. City of Owensboro, 16 Fed. 297;
Ward vs. Floor, 48 California page 51;

ExParte Young, 208 U. S. 123;
Frieberg vs. Dawson, 274 Federal 255.

The exercise of unlawful jurisdiction is a denial of due process and the party proceeded against is entitled to Federal protection.

Greene vs. L. and I. Railway Company, 244 U. S. 499;
Commonwealth vs. Louisville Gas Company, 122 U. S. S. W. 64;
Nichols vs. Coolidge, 274 U. S. 531;
Kennington vs. Palmer, 255 U. S. 100, 65 Law Edition 528.

The Statute of 1934, under which the seizure was made did not exist, because it had been held to be in substance, in previous litigation, a clear violation of Amendment 7, and the Court of Appeals of Kentucky had so held. See the decisions under point 24.

The exercise of such power violates the 14th amendment, and denies due process of law and the equal protection of the laws of Kentucky which are provided in the limitations of the Constitution of Kentucky against ex-post-facto legislation, and otherwise. Section 19, Kentucky Constitution.

Argument 3, Point 3

Judicial Code (Act of March 3, 1911, chapter 231, section 24, sub-section 1, 365 Statutes, 1091 Compiled Statutes, 1913, section 991,) gives the United States Court jurisdiction over a state officer who seeks to, and does burden interstate commerce, and presents a case arising under the laws of the United States.

If the Act of 1934 was invalid from the date of its passage it did not and could not provide a remedy by suit for anything. But we have here a valid mortgage, undenied as such, which was in the course of foreclosure by agreement, duly recorded and shown to be existing at page 16 (TR), and uncontested by either of the Appellees, and conceded by both, that the necessary diversity of citizenship existed.

Certainly a motion for judgment should have been sustained as to this claim, and an injunction should have issued, because the business and property seized denied to these appellants the right to pursue the collection of their debts to the end of the fiscal year, July 1938, if only three thousand dollars was secured.

It requires no citation of authority, only the Statutes on chattel mortgages to validate this mortgage, because it was in fact the property of appellants, and not that of the Central Distributing Company. Under an allegation of appellants petition, paragraph 3 of their amended petition and page 1 (TR), the question is raised by the assignment of error No. 10, and point 4 at page 37 (TR), and Carrolls Statutes 523a, 523b2, and 523b3 and 523b4, controlling chattel mortgages.

Seizure of these mortgage-assets and the liquor moving in commerce, (point 7, page 37 TR) was a violation of Article 1 section 8, of the Constitution of the United States, when appellees then had collected from the corporation nine thousand dollars in import taxes, for which appellants asked judgment in their petition against appellees, the Commonwealth of Kentucky having given its consent that action might be brought in any federal or state court to recover said illegal taxes, Act of 1934 and 1936.

Argument 4, Point 8

This point covers the import tax collection which Appellees possess and about which Central Distributing Company was cited on February 8 and April 5, 1938, under the Act of 1934, **repealed,** and the new Act of March 7, 1938.

The penalty statutes must be enforced by the Commonwealth's Attorney, who receives a certain portion of the fines and forfeitures in penal actions. The action must be brought in his district where the offense occurred, Campbell County, and could not be brought in Franklin County, where no part of the cause of action arose.

"Whocver proceeds against the property of another mu follow the provisions of the statute".

Pharis vs. Carver, 13 Ben Monroe (Kentucky) 236.

A cause of action is not pending unless a petition is file and a summons is served, filing and issuance good onl against Statute of limitations.

Section 2524 Carrolls Statutes;
Smith vs. Hunghey, 178 Kentucky, Page 702;
Casey vs. Newport Mill Co., 156 Kentucky, 623;
Paul vs. Smith, 82 Kentucky 451;
Moore vs. Shepherd I. Metcalfe, Page 97 (Kentucky)
Section 91 of Carroll's Code.
There can be no attachment unless a Summons served, and taking of property is denial of du process.
Hughes vs. Hardesty, 3 Bush, page 364;
Tinkham vs. Heyworth, 31 Ill., page 522.

Argument 5, Point 24

Whiskey is property in Kentucky as defined by statut Carrolls Statute, section 4022.

"For the purpose of taxation, real estate shall include a lands within this state and improvements thereon; an **personal estate** shall include every other species and chara ter of property—that which is tangible as well as that whic is intangible. Act of 1906 chapter 22."

If the property sought to be taxed is personal propert then the controlling law in levying taxes is the Constitutio of Kentucky, and the sections cited on page 2 (TR) i clusive of sections 172 and 174.

Now these sections of the Constitution provide that taxe must be uniform, and collected for public purpose, and a taxes shall be collected by general law. The assessment taxes here does not provide for a hearing when an assess ment is complained of. Therefore there would be no ad quate appeal from a wrong assessment. This tax on whisk

is also levied under a special Act without constitutional hearing and a record in this case shows that no such hearing was had.

Section 59 of the Constitution sub-section 29, provides that no special law shall be enacted where the subject is coverd by a general law or can be covered by a general law.

Exhibit A, page 24 (TR) shows that the hearing was, not whether a proper assessment had been made, but the notice was determined whether the Central Distributing Company's liquor license was not to be revoked. These were charges under the Act, this officer says, of 1936, a supplemental tax Act or revision tax Act of the Act of 1934, which latter Act was void, and being void, no supplemental Act or revision Act of the 1934 Act could be valid; the charge in the letter Exhibit A (TR) could not be sustained as a matter of law, the basis of which was an investigation made by a field officer, who apparently determined the tax. No authority could be given him or Mr. Hageman, the Revenue Commismissioner, to impose a tax under what must be called a special Act of the Legislature or under a regulation passed by a Board created under the Act of 1934, because that Act was void on its face, and had no force in law, and therefore there could be no valid or legal hearing under it for any purpose.

Section 59 of the Constitution of Kentucky is a prohibition to the legislature against the passage of special laws, and the tax section, 171, of the Kentucky Constitution prohibits such a law and the authority of such an officer. Under section 4 of Exhibit A, claim is there made by the commissioner for due import taxes which would be pressed as a ground for the revocation of the license of Central Distributing Company, and a failure to report such taxes would also be a ground. This Act of March 7th, 1938, succeeded the Act of 1934, while these charges were pending, and they were again resumed on April 5, 1938 by another officer created under the Act of March 7, 1938, who cites Central Company in section 3, Exhibit B as violating the Beverage Alcoholic Control Act of 1934.

Now then the Central Distributing Company, was on thi date called to answer charges under the repealed Act o 1934, which, as we have said, was an Act licensing the sal of whiskey as a beverage, and void under Amendment of the Constitution of Kentucky, and if void as a beverag Act, the supplemental Act of 1936 was void, because i sought to levy a tax on the sale of whiskey as a beverage It is incomplete in itself.

The law in Kentucky at that time was established.

In Brady vs. Bannon, 134 Kentucky, page 769, it wa held, that to prevent the collection and imposition of such tax, injunction is the proper procedure. Also, in Gates vs Barrett, 79 Kentucky, page 295.

The law of Kentucky is ably discussed in Hagar vs. Wal ker, 128 Kentucky, page 1. A tax case under amendment 7 There, it was held that no such tax could be levied in such case that is here contended for.

In Craig vs. Renaker, 201 Kentucky, page 582, and in Morganfield vs. Wathen, 202 Kentucky, page 647, there will also be found absolute affirmance of the position here taken, not only as to the lack of uniformity of these taxes, but that they were invalid under the 7th amendment, and if invalid no license could issue therefore, nor could there be a violation of the Act of 1936, revision of 1934, which did not exist. Kentucky Constitution, section 51 provides how a revision may be made.

The illegality of such a tax is considered in the cases of Frieberg vs. Dawson, 274 Federal, page 420, a decision by the Sixth Circuit, that injunction is the proper remedy, and that the tax as levied was a property tax, and void under the Constitution of Kentucky, a 50 cent withdrawal tax, while there was on the statutes a 3 cents per gallon tax. The injunction was issued.

The Supreme Court of the United States in Dawson vs. Kentucky Distilleries, 255 U. S., page 288, affirms the hold- ing of the Sixth Circuit.

In RESPECT of the Act of 1934, it is clearly void, but if it had been valid, and repealed, there could be no proceeding for an offense committed under it or April 5th, as is shown by Exhibit B, page 26 (TR).

In Speckert vs. City of Louisville, 78 Kentucky, 88, the Court of Appeals said:

> "When repealed it must be considered as a law that never existed for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. Upon this principle the repeal of a statute puts an end to all prosecutions, and to all proceedings growing out of it, pending at the time of repeal. And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law when their decision is rendered. It follows therefore the warrants must be desmissed."
>
> "When a statute is repealed that ends litigation under it, and the repeal of the law imposing a penalty is in itself a remission."
>
> Lewis vs. Poster 1., New Hampshire.

Thus again, we find the property, securing mortgage of Appellants was illegally seized for a tax that was never legally levied, and on any view of the Act of 1934, the supplemental Act of 1936, and the present Act of 1938, there was no valid authority acting on a valid claim for taxes, and no jurisdiction anywhere to impose, no valid thing to impose, and no valid court imposing, and no hearing or summons that could satisfy the 14th Amendment.

So also, there was no valid assessment:

Russell vs. Carlisle, 10 Kentucky Law Rep., page 25;
Royer Wheel Co. vs. Taylor Co., 104 Kentucky, 742;
Louisville Tobacco Warehouse Co. vs. Commonwealth, 106 Kentucky, 165—see sections 4028 and 4029 on penalties and how collected. (Carrolls Statutes).

On the question of the effect of the repealed statute, we cite these Federal cases of Railroad vs. Grant, 98 U. S., 398-401;

Coe vs. Errol, 116 U. S., page 517;
Baldwin vs. Seelig, 294, page 516.

Argument 6, Point 1

Sections 109, 125, 126, of the Kentucky Constitution limit the exercise of Judicial Power to the Courts, and the power here attempted to be delegated to these individuals as shown by the citations exhibit A and B, pages 26 and 28 (TR) to be exercised by them is a violation of the Constitution. Under section 380 of the Judicial Code it is provided that an interlocutory injunction may be issued against the abuse of power by a state officer, in favor of the person injured. Unquestionably the damage committed by such officers here was irreparable and immediate. The authority is ruthless and asserted in defiance of Constitutional safeguards.

In the latter case it is said:

> "Without passing on the question of constitutionalities the court dismissed the Bill for the reason that the complainants had an adequate remedy at law, and the correctness of the decree of dismissal is the question now before us on direct appeal". The dismissal was held to be error, the petition stated a cause of action for aquitable relief. And in Terrace vs. Thompson, 263 U. S. 197, 68 Law Edition 255, it is held: "But the legal remedy must be as complete, **practical, and efficient as that which equity could afford.**"

Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravences the Federal Constitution where-ever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and, in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who

threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, my be enjoined from such action by a Federal Court of Equity.

Cavanaugh vs. Looney, 248 U. S. 453;
Truax vs. Raich, 239 U. S. 33;
Packard vs. Banton, 264 U. S. 140, 68 L. Ed. 596.

Argument 7, Point 16

The Revenue Commissioner of Kentucky had no authority to maintain any action against the Central Distributing Company, Inc. "The said J. W. Martin, Revenue Commissioner, under attachment process closed the place of business of petitioners without legal or statutory authority of the State of Kentucky in this proceeding (see amended petition). T. R. page.

Section 4260c, (Carrolls Statutes), (Act of 1912), chapter 116, is the authority for the Revenue Commissioner to act, we think. This Act was in full force at the time the attachment suit was brought, and it is the controlling law of Kentucky. It reads:—"No revenue agent shall be permitted to collect any moneys due either the state or any county without special written authority from the Auditor. Should any such revenue agent violate the provisions of this section, he shall be deemed guilty of a misdemeanor and, upon indictment in the county in which said acts were done, and conviction, he shall be subject to a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), and removal from office. (1906, c. 22, p. 88, Art. XVII, 7.)

The auditors consent had not been procured, and no such authority could have been granted in this kind of case, because the statutes of Kentucky, section 4261, provides (Carrolls) "He shall report to the Commonwealth's Attorney, County Attorney or Grand Jury all persons who may be guilty of violating the laws governing license taxes, and shall cause said offenders to be prosecuted; and in all cases

where the person so reported or prosecuted shall be granted license, and shall pay the tax and penalty of twenty per cent (20%) as imposed by law, the revenue agent who reports the offender, and who causes the payment of such license and penalty, shall be entitled to receive such penalty of twenty per cent (20%) as compensation for his services. (1906, c. 22, p. 88, Art. XVII., 8)."

The remedy in the state court is not adequate.

Dawson vs. Kentucky Distilleries, 255 U. S., page 288;
Smythe vs. Ames, 169 U. S., 466;
Alabama Railroad Company vs. American Cotton Oil Company, 229 Federal, page 18;
Texas Pacific Company vs. Cox, 145 U. S., 593;
Gates vs. Barrett, 79 Kentucky, Supra, where an injunction was issued to enjoin the collection of an invalid tax.
Hegley vs. Henderson Company, 107 Kentucky, page 414;
Metcalfe vs. Watterson, 128 U. S., page 586.

"The Remedy is in the Federal Court".

Cowley vs. Railroad, 159 U. S., page 569;
Regan vs. Farmer's Loan Company, 154 U. S., 362.

The Circuit (District) Court has jurisdiction, not only on the ground of diverse citizenship but upon the further ground, that, as the statute of Nebraska under which the Board proceeds is assailed as being repugnant to rights secured to plaintiffs by the Constitution of the United States, and in such a case the proceeding may be regarded as arising under that instrument.

If the remedy is doubtful by action at law, equity has jurisdiction to enjoin the collection of a discriminatory tax.

In Brown vs. Maryland, 12 Wheat. U. S., 419 it is said:

> "All must perceive that the tax on the sale of an article imported into the state is a tax on the article itself."

Frieberg vs. Dawson, 274 Federal, 430.

Constitution of Kentucky, section 171 places a limitation on the legislature by these words—"Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax."

This authority of course does not extend to Ohio in interstate commerce, and it has been held that a tax cannot be levied on imports by a state. Therefore a permit required before the liquor could come into the state would be without legal sanction.

See 23 at page 35 (TR) which calls for a tax on imports. "Every person who purchases distilled spirits, and has the same shipped into the state of Kentucky from points without the state, as provided in section 5 hereof shall at the same time said permit is issued pay a license tax thereon of 5 cents per gallon." This is an evasion—a subterfuge.

Section 174 of the Kentucky Constitution, is another limitation on taxation (TR) section 25, page 35.

> "All property whether owned by natural persons or corporations shall be **taxed in proportion to value**—and all corporations shall pay the **same rate of taxation** as individual property."

Five cents per gallon levied indiscriminately on whiskey worth forty five cents per gallon and five cents per gallon on whiskey worth $18 per gallon, violates this provision of the Kentucky Constitution. See, the affidavit of O. A. Pieper, where he said, (page 21 TR) and N. McDowell, same page (TR) that whiskey six months old is worth $12 per case (3 gal.) and fifteen year old whiskey is worth $70 per case.

So we see that under the Kentucky Constitution alone the tax is an invalid tax.

Federal Authorities on this tax

Section 41 (8) 28 U. S . C. A.
Art. 1, section 8, Constitution of United States.

If liquors in interstate commerce are not intended to be used in the state, they are not subject to state regulations. Such shipments must be received, possessed, sold or used in violation of state laws.

Clark Distilling Company vs. Western Maryland Railway Company, 242 U. S., 311.

The state regulation of highways must not interfere with interstate commerce.

Hodge vs. Cincinnati, 284 U. S., 335;
Stephenson vs. Binford, 287 U. S., 251.

Regulation of commerce between the states in committed solely to Congress and this control is exclusive of the states.

Ohio vs. Thomas, 173 U. S., 276;
Melson vs. Commonwealth of Kentucky, 279 U. S., 245.

Interference with a single carrier constitutes a prohibited interference with interstate Commerce.

Louisville and Nashville R. R. Co., Eubanks, 184 U. S., 27., 58 Supreme Court (L. Ed.) page 914.

Until such transportation is completed by delivery no burden can be placed on it by state law, section 8, Art. 1, U. S. Constitution.

Furst vs. Brewster, 282 U. S., 493.

Congressional legislation is supreme.

Missouri Pacific vs. Stroud, 267 U. S., 404;
Asher vs. State of Texas, 100 U. S. 339, and 128 U. S. 129;

In Gudger vs. U. S., 249, a transport of whiskey was stopped in Virginia, then a dry state. It was released under the inter-state commerce doctrine.

Carson vs. Petroleum Co., 279 U. S., 95;
L. and N. Railroad Company vs. F. W. Cook Brewing Company, 223 U. S., 568.

The state may under the 21st Amendment, exercise police power, but this power is limited under this Amendment to **use** and **delivery**, and has no relation to the power to raise revenue by the state. Taxes qualify under the latter power.

Farmer's Grain Company, 268 U. S., 189;
Penna vs. W. Va., 262 U. S., 553;
Crutcher vs. Kentucky, U. S. 141 at page 47;
Kidd vs. Pearson, 128 U. S., 1-20-32;
Magnuson vs. Kelly, Kentucky Comsr., 35 Federal (2nd) 867;
Perkins vs. U. S., 35 Federal (2nd) 849.

Insofar as whiskey is an article of commerce, its regulation is exclusive in the Congress.

Pacific Produce Company vs. Martin, 16 Federal Supp. page 34;
McCormick and Co. vs. Brown, 286 U. S., 131;
Dugan vs. Bridges, 16 Supp. (Fed.) page 700 and 634.

If the state legislation relates to the police power and has only an incidental effect on Commerce the legislation is valid.

Nashville, Chattanooga and St. Louis Railway Company vs. Alabama, 128 U. S., 96;
Hennington vs. Georgia, 163 U. S., 299, 166.

These authorities all make it clear that the legislative enactment of the states passed under their admitted police powers may be exercised until Congress acts.

From the early days of the Webb-Kenyon Act up to this good hour the police power is with the states to protect the health of their own people, hence the words **use, delivery etc.** are significantly used. By the widest stretch of imagination could the state's exercise of police power have

any relation to the imposition of taxes, either by a device called a permit or directly on the article transported. In each case it would be a tax on the imported article, the Federal Commerce Clause remains supreme and taxation may not be imposed by a state on imports. So that when Appellees motion to dismiss was sustained, it was sustained on the ground Appellants had an adequate remedy by suit; exactly opposite to this did this court decide in the case of Dawson vs. Kentucky Distilleries. 255 US 288

There is no decision that supports the action of the Three-Judge Court, which assembled under Judicial Code, section 266, or that holds they had a right to sustain a motion to dismiss; for Acts under 1934-36 are void.

There is no case holding that where Congress has acted in a matter of national concern, that the state may occupy the field with regulatory force, and in tax matters this has no single variance or exception.

Until there is some respectable authority it would appear there was no justification for the dismissal of the Amended Bill, when it was in fact a suit to recover money had and received, both by the Central Distributing Company and the Revenue Commissioner, acting for the state. It was money had and received, arbitrarily closing all resources against the Appellant's collection of their debt.

West vs. Natural Gas Co., 221 U. S., 229.

In Simpson vs. Shepherd, 230 U. S., 352, Mr. Justice Hughes stated the rule: "If a state enactment imposes a direct burden upon interstate Commerce it must fall, regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of Federal regulation should be free."

Robbins vs. Taxing District, 120 U. S., 489—the national law the Constitution of the U. S. applies, Art. 1, section 8, taken with the direct prohibition against levying of import taxes; and that Congress alone may levy such a tax on im-

ports for inspection of the importations to protect health, and the cost of that inspection is the limitation on Congress.

Thus it is clear that the issue here made and admitted entitled Appellants to injunction.

Section of the Law 4265 Carrolls Statutes prevents the Revenue Commissioner from incurring any expense against its credit—not liable for costs.

No bond shall be given as in the case of individuals, which left Appellants without remedy.

Argument 8, Point 14

Assignment of Error 10 Subsection (b)

This assignment and point attacks the validity of the tax for which the levy was made.

Manifest inequality through arbitrary classification will not be sust..ined; and the tax must be **uniform** within the territory as to class of subjects on which it is laid.

This doctrine was established in California, under similar provisions in Ward vs. Flood, 48 California, page 51.

The equal protection of the laws is guaranteed by the 14th Amendment, and this can only mean that the laws of the state must be equal in its benefits and burdens, for less than this would not satisfy the equal protection of the laws.

Greene vs. L. and N. Railroad, 244 U. S., 499;
Commonwealth vs. Louisville Gas Company, 122 S. W., 164;
Macon Grocery Company vs. Atlantic, 215 U. S., 501;
California vs. Southern Pacific, 157 U. S., 269;
Ex Parte Virginia, 100 U. S., 339;
City of Knoxville vs. Southern Con. Company, 220 Fed., 236;
J. and A. Frieberg vs. Dawson, Supra it seems to us, decided under these tax provisions and which analyze the same remedy under the laws of Kentucky, holding there is no adequate remedy, settle this cause.

MICROCARD

TRADE MARK ®

22

MICROCARD® EDITIONS, INC.

PUBLISHER OF ORIGINAL AND REPRINT MATERIALS ON MICROCARD AND MICROFICHES

901 TWENTY-SIXTH STREET, N.W., WASHINGTON, D.C. 20037, PHONE (202) 333-6393

The statute relied on by the Court, never existed, no repealed, is section 2 of the (green book) Record, not 1 as stated by the Court, is as follows:—

> "The aggrieved Permittee or taxpayer shall pay th tax or fee as and when required, and may at any tim within two years from the date of such payment su the Commonwealth through its Agent, the Auditor o Public Accounts, in an action at law in any cour **State or Federal,** otherwise having jurisdiction of th parties and subject matter."

The appropriate Federal Statute is section 266 of th Judicial Code as amended, Title 28, section 380 als Amendment of February, 1925, C. 229, section I, 43 sta utes of 938, (against illegal statutes of state).

Our allegation is in the Amended Petition.

We will examine this ground in the light of previous de cisions in Kentucky—the writer of this brief having bee a member of the Constitutional Convention and jointly wit John D. Carroll, of Carroll's Code fame were the autho of these tax provisions. (TR page 2).

Exhibit C (Page 1 TR)

Property, which is whiskey, section 172, Constitution o Kentucky, must be assessed at its fair cash value, and an officer who fails to so assess it will be guilty of misfeasanc and upon conviction shall forfeit his office, so there is litt the legislature can say about it, for the forfeiture is her only an additional penalty may be fixed.

Section 171, Exhibit D (TR page 2)

"Must be levied by General Laws, for public purpose and must be uniform", and we may add the requiremen of Exhibit C. "fair cash value".

Exhibit E (page 2 TR)

Section 174. "It must be taxed like individual property and shall be taxed in proportion to its value". It shall b

taxed at the same rate of taxation paid by individual property'.

Section 181, found in the Statement of Jurisdiction, provides for uniformity, specifically, also.

See the affidavits of McDowell and Pieper at (page 20-21 TR) McDowell:

"That a tax of the medium or lower grades of whiskey as to age is confiscatory, this whiskey being marketable at from 45 cents per gallon to $1 per gallon, or (as) (in) cases from $13 per case to $18 per case, with the tax".

"The buyers will not pay the price including the tax, and that prior to the imposition of the tax, business was good." . . . ."Fifteen year old cased whiskey of the Bourbon type is worth $70 per case, and four year bonded whiskey is worth $31 per case."

Pieper (page 21 TR)

"West Point is $9 per case of quarts, and the price of Grandad or Old Taylor is $30.12 per case of quarts, and the price of 15 year old Sunnybrook, (the highest priced) is $70 per case of quarts.'

After the 1936 Act was passed the profits were curtailed, says Pieper, and many wholesalers went out of business, they discontinued their business after spending large sums of money to build up—they diverted their business to other states because it was impossible for a retailer in the state of Kentucky on account of the aforementioned tax to make anything.

So says Oscar Bayer; so says Jacob Smith and others. According to this undisputed testimony, the 1936 tax, supplemental Act of the 1934 Act, or as the Commissioner calls it, a revision Act, the law was:

Confiscatory, under the decisions of the Court of Appeals.

Discriminatory under the decisions of the Court of Appeals.

Was not assessed at its fair cash value, as provided i section 172 of the Constitution of Kentucky, and i was a special law.

Was not uniform under sections 171 and 181, and th Act was not enacted as a General Law, but was "revision" Act of the 1934 Act, which was void.

Section 51 of the Constitution provides just how a la shall be revised or amended, which is as follows:

"No law enacted by the General Assembly shall relate t more than one subject, and that shall be expressed in th title, and no law shall be revised, amended, or the provision thereof extended or conferred by reference to its title only but so much thereof as is revised, amended, extended o conferred, shall be re-enacted and published at length."

Board of Penn. Com. vs. Spencer, 159 Ky. 255.

The tax Act of April 9, 1936, has the following title:

"An Act relating to revenue and taxation" on the sal and distribution of alcoholic beverages, and declaring a emergency.'

This title is clearly in violation of section 51, because th Act itself attempts to treat the subject of an additional pre scription for medicine, for hydrated oxide of ethyl, fron whatever source about whatever precess produced. It als treats the subject of the transportation of liquors and re quires that liquors exported from the state be sold only t retailers in other states, provides for general authority fo the Revenue Department, disregarding the tax provisions o the Constitution of Kentucky. It also provides for a specia law on attachment contrary to the provisions of the Genera Law of the Kentucky Statutes, and for the issuing of injunc tion against the operation of the business of wholesalin and retailing liquor. In other words it is a flagrant viola tion of the constitutional provisions above quoted, an generally partly against special legislation.

It is also a violation of Section 59 of the Constitution which reads: "the General Assembly shall not pass loca

or special acts to authorize or regulate the levy, the assessment or collection of taxes." It violates subsection 29 of section 59 which provides, that in all cases where a general law can be made applicable no special law shall take effect. It is also contrary to the Bill of Rights of the Constitution of Kentucky section 3 thereof, which provides "that no property shall be exempt from taxation except as provided in this constitution."

The taxation of whiskey at $1.04 per ~~case~~ gal., worth $70 per case (3 gals), and the taxation of a case worth $12 (3gals), or worth 45c per gallon, is a clear exemption of the $70 per case whiskey. In other words, **based on cash value,** as provided in Section 172 of the Constitution there in an exemption of between $12 and $70 per case in favor of the higher priced whiskey. Now it is useless to follow in detail these provisions of the act of 1936 or to detail what is legislative power and what is judicial power under the Constitution of Kentucky, because the Constitution defines, in section 27, 28, 109 and 135 what is the limitation of judicial power.

The Court of Kentucky has repeatedly held that the Board of Railroad Commissioners have no such authority as the legislature conferred on the Revenue Commissioner and the Kentucky Alcohol Beverage Board, in respect to shipment, of taxation, and of the general regulation of liquors. They may confiscate whiskey without a hearing, and a Revenue employee is authorized to seize whiskey and confiscate it without a hearing. The writer does not know of a single case where the Bill of Rights of the Constitution of Kentucky, section 10, has been complied with. This section makes it impossible to seize any property without first describing it and applying to a court of competent jurisdiction for a warrant. The constitution provides that an officer may not seize any person or thing without describing them as near as may be.

Section 28 of the Constitution provides that no such officer may exercise any power properly belonging to the judicial or legislative departments. Section 135 provides that no courts, save those provided in this Constitution shall be established with judicial power.

The Court of Appeals of Kentucky held in the L. and
Railroad Company vs. Greenbier Distillery Company, 1
Kentucky, page 775, and the L. and N. Railroad Compa
vs. Garrett, 231 U. S., page 298, that the Railroad Comm
sion of Kentucky could not exercise any judicial power su
as is conferred on the tax commission under the 1934 A
the 1936 Act or the Act of March 7, 1938. This latter A
we have assailed as unconstitutional as well as the Act
1936, in our amended petition found at page 8 subsecti
C of paragraph 10, and we have also assailed in section
of our amended petition the unconstitutionality of the
taxes as a violation of, not only Article 1, Section 8, of t
Constitution of the United States, but the Interstate Co
merce Laws, and the 14th Amendment to the Constituti
of the United States.

Cumberland Tel. Co. vs. Hopkins, 121 Kentucky, 8

The Act of 1934, called the Kentucky Alcohol Cont
Act specifically prohibited the manufacture, sale, tra
portion, possession or the disposition of spiritous, vino
or intoxicating malt liquors, except for medical, sacramen
and scientific purposes.

Yet it specifically licenses wholesalers and retailers
sell whiskey as a beverage and provides penalties also
the manufacture of whiskey.

Just how such vicious legislation, contravening not o
Amendment 7 of the Constitution of Kentucky, but eve
other provision relating to taxation is hard to envision, t
any intelligent body of men could be induced to adopt

Not only did that Act provide for a five-cent per gal
ad-valorem tax, but the Act of 1936 and 1934 both p
vided for this five-cent tax. The Act of 1936 and 1934 p
vided for a five-cent per gallon import tax, and the Act
1936 alone provided for an additional ad-valorem tax
$1.04 per gallon, regardless of the fact that such taxat
is specifically prohibited by the Constitution of Kentuc
Section 175 of the Constitution prohibits the extension
any relief from taxation or that any power of the Comm

wealth shall be delegated or suspended. It has been repeatedly held by its Court of Appeals that a license tax may be impossed upon a business in addition to an ad-valorem tax, but not as a substitute for it, but no two ad-valorem taxes may be levied against the same product.

The Revenue Commissioner and his Board of Control have also established a regulation that half-pints shall be taxed at the rate of $3.36 per case, and pints and quarts at the rate of $3.12 per case, which is a violation of section 174 of the Constitution which provides that taxes shall be levied in proportion to the value and at the same rate.

The Court of Appeals of Kentucky held in the case of Morrell Refrigerator Car Ca., vs. Com., 128 Kentucky, 447, that an arbitrary classification of subjects of taxation for purposes of taxation was void.

It held in the Commonwealth vs. Southern Pacific Company, 150 Kentucky, page 97, that the assessment of railroad property was exclusively in the power of the General Assembly, as to method of assessment and classification.

The Court of Appeals held in Holtzhauer vs. City of Newport, 94 Kentucky, page 396, that levying taxes under section 171 of the Constitution must be made according to value and that this was the law of Kentucky prior to the adoption of the present Constitution.

It held that licenses must be uniform under the Constitution of Kentucky in the case of Hager vs. Walker, 128 Kentucky, page 1.

The Court of Appeals of Kentucky held in Greene vs. L. and I. Railway Co., 244 U. S., 499, that section 174 of the Constitution which provides that all corporate property shall pay the same rate of taxation paid by individual property meant that not only the percentage of the rate, but the basis of the valuation, shall be the same.

The Court of Appeals held in the case of L. and N. Railroad Co. vs. City of Barbourville, 105 Kentucky, page 174, that section 172 of the Constitution was self-executing, re-

quired no legislative provision to vitalize it and that, assessment of property, of all kinds must be based on the fair cash value of the property.

Therefore, the Legislature could not make any different provision nor could it levy any different rate on whiskey unless it was based on the value, which value must be ascertained upon some definite method of assessment, and no definite method of assesment was provided for in any of these Acts. They decided in Commonwealth vs. Taylor, 101 Kentucky, page 325, that a mode of assessment of distilled spirits was necessary, and that while the method might be special the assessment must be general.

They said also in Stewart Co. vs. Lewis, 7, F. Supp. 438, United States 294, page 550, that the Bill of Rights in respect to Taxation must be taken into consideration. This meant a strict Constitution of every tax Act.

They held however in the Standard Oil Co. vs. the Commonwealth, 119 Kentucky, page 75, that the Legislature could not impose double taxation in more than one license tax under the excise provision of the Constitution. That this would be double taxation, prohibited by the Constitution of Kentucky. They held also that a State Board might be created which might place the valuation upon franchises as well as property taxed on its fair cash value provided the machinery and method of taxation was specified in the Act. and furthermore that the assessment must be uniform upon all classes of property, and that the assessment must not be arbitrary or confiscatory.

Argument 9, Points 14 and 15, Section 9 Petition

"That said Act (April 9, 1936) lacks uniformity in its operation, and is an arbitrary classification of Liquors, for taxation, in violation of the Constitution of the State of Kentucky, sections 171, 172, 174 and 181, as alleged, discriminatory and confiscatory".

This is the allegation of the Petition, and if sound then

there could be no dismissal for lack of a stated cause of action.

In Martin vs. Norcero, 269 Kentucky, 151, the question of Discriminatory tax was involved:

In this case the Court of Appeals held that a tax of 28 cents on a gallon of Ice Cream was confiscatory. Already on the cost price of whiskey the total tax on whiskey amounts to near about 1700%-rating the actual cost of 25 cents per gallon. Answering the statement that the Legislature may by taxation exterminate an industry rather than penalize it, we should not confound this doctrine with a lawful commodity doctrine and an unlawful commodity doctrine, as each relates to taxation. Nor should we overlook the fact that taxation in Kentucky is strictly under tax provisions of the Constitution, and within the limitations there expressed, so we may dismiss the foregoing doctrine as having no application.

Whiskey is property, as defined by the statute, and under section 172 of the Constitution it must, when assessed for taxes, be assessed at "ITS FAIR CASH VALUE". We find here that six months old whiskey (McDowell at page 20 TR) Quote: "That a tax on the lower and medium grades of whiskey as to age is confiscatory, this whiskey being marketable at from 45 cents per gallon to $1 per gallon". See also other affidavits in the unprinted record and the TR at page 21 A. O. Pieper. 33-34-36 (Omitted Record) Original. Corporation property (whiskey in cases) must be assessed the same as "individual property". This says the same rate. Exhibit No. TR 2.

If Ice Cream, for instance will not stand a tax of 28 cents per gallon, when selling at from 70 to 80 cents, how is whiskey selling at from 45 cents to a dollar going to stand a state tax under this indentical provision of the Constitution of $1.0[illegible] cents per gallon, both ad-valorem taxes. This means the tax is more than twice, the or "its fair cash value, estimated at the price it would bring at a fair voluntary sale." McDowell calls it "marketable", which is the same as "voluntary sale", the latter, the words of the Constitu-

tion, section 172. The Court of Appeals has decided that the Legislature has the sole authority to fix the rate, method and value of taxed property, subject to the limitations expressed in the Constitution. So we have the Legislature assessing by the gallon, at more than twice the "marketable" value or "fair cash value" of the product, and this in face of the fact that the article already bears a Federal Tax of approximately 700% on the selling price, and 1300% on the cost price of the article, 45 cents, selling and 25 cents cost.

This tax is not only a plain violation of the Constitution, but its confiscatory under the decisions of the Court of Appeals of Kentucky. Can it stand then?

> New State Ice Cream Co. vs. Liebmann, 282 U. S., 262;
> Stewart Dry Goods Co. vs. Lewis, 294 U. S., 550;
> Glenn vs. Field Packing Co., 290 U. S., 177.

"The tax hereby imposed is not to be collected if the result will be to wipe out the profits of a business conducted with ordinary efficiency, or to reduce the profits to a level unreasonably low". This is the language of Justice Cardozo in the Stewart Dry Goods case under the same provisions of the Constitution.

The Court of Appeals of Kentucky, in City of Louisville vs. Pooley, 136 Kentucky, 286 said:

> "While it is true that the amount of a license fee imposed as a tax is ordinarily a question for the taxing power and the Courts will not interfere with its discretion, yet this Court is Committed to the doctrine that this rule is subject to the LIMITATION that the tax imposed should not amount to a prohibition of any useful or legitimate occupation."

The Bill of Rights of the Kentucky Constitution includes section 1 to 26, inclusive, prohibits special levy for taxes. Is Liquor-selling, a useful occupation or legitimate? So long as the law-making power says that it is, that ends the argument.

Mr. Pieper at TR 22 said:

> "The profit was greatly curtailed to the wholesaler as well as the retailer on the cheaper grades of whiskey sold, thus causing many and divers wholesalers and dispensers who were operating prior to the enactment of the 1936 tax Act, to suspend operations, and compelling them to discontinue their business upon which they spent large sums of money to build up, by reason of a great many consumers having purchased formerly their whiskies and spiritous liquors from retailers in the State of Kentucky, and by reason of said tax, having diverted their purchases to other neighboring states on account of it being impossible for a retailer in the state of Kentucky to compete with the prices of other states on account of the aforementioned tax."
> Here you have the uncontradicted result.

There is no limitation in the Constitution on the amount of tax levied on franchises or licenses, yet there is no doubt if it should be so unreasonable or arbitrary as to amount to a confiscation of property the Courts would interpose on the ground that it was violative of the Bill of Rights which provides the right of acquiring and protecting property as a Constitutional guarantee.

Hager vs. Walker, 128 Kentucky, page 1.

But a limitation is placed on the levy of taxes on "property-" subject to taxation. It must be uniform, it must be taxed as individual property, it must be based on the CASH VALUE, it must not be discriminatory, it must not be confiscatory. These are all limitations, which considered together make this tax impossible.

In Dawson vs. Kentucky Distilleries and Warehouse Company, 255 U. S., 288, a tax was under review levied under the sections of the Kentucky Constitution whereby the legislature attempted to evade the "fair cash value" provision and the uniform provision. They called it an annual license tax, a privilege tax, providing for withdrawal at 50 cents per gallon.

The Court said:

> "The name by which a tax is described in the Statute imposing it is immaterial. The character must be de-

termined by its incidents, and, obviously it has none of the ordinary incidents of an occupation tax. To levy a tax by reason of the ownership of the property is to tax the property. It cannot be made an occupation or license tax by calling it so."

Said Judge Carroll in Hager vs. Walker, 128 Kentucky, page 1. "The fundamental idea of taxation is that the burdens shall be borne equally and alike by all persons, and that no one class shall be taxed for another, or one class be discriminated against to be advantage of another, or an exemption allowed one that is not conceded to another."

Section 181 and 182 which are not applicable here however prove the intention of the Constitution makers to adhere to the idea that no taxes shall be levied except by general laws, and this rule applies to municipalities as well as the state.

Here we have a 5 cent per gallon tax which under the Dawson case is an ad-valorem tax, (then it was 3 cents) and to avoid two ad-valorem taxes, the legislature, as we see, called it a withdrawal privilege tax, which the Supreme Court denounced as a subterfuge.

Sperry and Hutcheson vs. Owensboro, 151 Kentucky, 389.

This Court in Colgate vs. Harvey, 296 U. S., page 404, said: that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the subjects of the legislation so that all persons similarly situated shall be treated alike.

State vs. Hoyt, 71 Vermont, 59, 64-66 and 42 A. 973.

Here we have a tax exempting owners of aged or $70 per case whiskey, the difference between $12 per case whiskey and that sum for aged whiskey, a substantial difference of $58. In other words, a tax more than five times as much on the man who owns $12 whiskey per case at market value,

and so this court blankets that situation in the Harvey case, Supra.

> "Does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation. Mere difference is not enough."

Therefore, the tax imposed is not only contrary to the equal protection laws clause of the Fourteenth Amendment of the United States Constitution, but also violates the Bill of Rights of the Kentucky Constitution, and is contrary to sections 171, 174, 172 and 181 of said Constitution.

It denies due process under the old decision of McCullough vs. Maryland, 17 U. S., 316.

It confiscates property under the decision of Bushaber vs. Union Pacific Railroad, 240 U. S., 1 to 5.

It is an arbitrary classification under Nichols vs. Coolidge, 274 U. S., 531.

Hiner vs. Donnan, 285 U. S., page 312.

The distinction between state constitutional restrictions of the different states is pointed out in Magano vs. Hamilton, 292 U. S., page 40, and Glenn vs. Field Packing Company, 290 U. S., 177.

The question always to be considered is, what restrictions are laid in the constitution under which the tax is levied.

This Act of 1936 attempts to burden interstate commerce with the tax.

> "Every person who shall import any alcoholic beverage in Kentucky for the purpose of sale in any other state is hereby required to transmit to the Commissioner of Revenue within 24 hours after receipt of same an original copy of each invoice for such beverage."

Section 15, of the 1936, tax Act, provides in Section six (blue book). "Nothing in this Act shall be construed to re-

quire the payment of the tax imposed herein on the sale of the same alcoholic beverages more than once." Original 9

In spite of this section, the Revenue Commissioner, assumes the authority, and exercises it, to require a tax from the wholesaler, Central Distributing Company, Inc. on whiskey purchased by it in the state before it is sold, when that same whiskey has already been subjected to a gallonage tax of 5 cents, a property tax, not a privilege tax, because a license is imposed of $500 on the distillery for the privilege of manufacturing and distilling whiskey.

Section of the Blue Book record (Transcript, not printed) H-9 reads: "The wholesaler who purchases or otherwise acquires title to any Alcoholic beverage made taxable by this Act etc.," and section 6, same reference See H record Original 9.

> "The wholesaler or manufacturer who imports any alcoholic beverage shall pay the tax imposed in this Act."

Now then we have a tax of five cents per gallon imposed on the manufacturer, then $1.04 per gallon on the wholesaler. We have a license paid by the Distiller and a license tax paid by the wholesaler. Thus two ad-valorem taxes are imposed on the same gallon of whiskey. In the Dawson case supra. there was 3 cent gallon tax paid by the Distiller and a withdrawal tax of 50 cents per gallon paid by the wholesaler or distiller. The state confessed the 50 cent tax could not be levied, after the court indicated it would hold it to be a property tax. Such now is the plain case here, as shown by the 1934 Act, five cents paid by the Distiller, which cannot be called a license tax, because he has paid one, $500. But as shown, the very principle announced in the Act of 1936, that no two taxes should be levied on the same whiskey, was by arbitrary exercise of power, levied to the wholesaler on the same whiskey, on which there had been a tax of 5 cents already paid by the distiller, and we have a double tax on property, the same property.

We repeat again, the provision of the 1936 Act, section 15 — Blue Book, record. H. 9.

> "Nothing in this Act shall be construed to require the payment of the tax imposed herein on the sale of the same alcoholic beverages MORE THAN ONCE."

Thus we contend, had the Central Distributing Company not paid the alleged taxes said to be due, and for which its property was attached, since it had paid a license tax of $1000, a property tax could not be imposed on the same beverage, inasmuch as the Distiller had already paid an ad-valorem tax, and another of $1.04 could not be levied on it again and charged to the wholesaler.

As to the whiskey imported, no burden could be placed on the liquors for any reason or purpose—they were in transit.

Alabama Railway vs. American Cotton Oil Company, 229, Federal, page 11;
Southern Pacific Company vs. Corbett, 20th Supp. 940;
Arkansas and Louisana Pipe Line Company vs. Coverdale, 20 Supp., page 676;
Pacific Fruit Company vs. Martin, 16th Supp. 34;
Highland Farms Dairy vs. Agnew, 16 Supp., page 575;
Vance vs. Vandercook, 170, U. S., pages 439 to 447;

As to the double ad-valorem, assuming the above 1936 void, the Constitution prohibited two taxes of the same kind —section 174 authorizing one license tax, and section 172 authorizing one cash value levy on the property, either real or personal, and 171, prohibiting a tax not uniform and one not levied under a general law.

On this ground a double taxation, the tax was void.

Com. of Ky. vs. Walsh's Trustees, 133 Ky., 112;
Campbell County vs. City, 174 Ky., 712;
Cumberland Tel. Co. vs. Hopkins, 121 Ky., 850.

No Remedy at Law—the remedy held sufficient by the Three-Judge Court, not sufficient.

The jurisdiction of the Federal Courts cannot be defeated by a prescribed form of recovery by the legislature.

C. and G. Company vs. Harris, 235 U. S., page 292; Hunter vs. Conrad, 85 Federal, 803.

The guarantee of the 14th Amendment is the immediate and effectual right to protect the citizen, and here we have the requisite diversity and amount, and a cause of action stated for injunctive relief, but if not, then a cause of action.

The case of Smith vs. Wilson, 273 U. S., 388, holds that it was the duty of the Three-Judge Court to send the case back to the district court of Eastern Kentucky for trial on the merits under issues as made, since they held there was jurisdiction.

Ex Parte vs. Buden, 271 U. S., 461—13 Fed. (2) 1007.

Argument 10, Point 5—Assignment of Error No. 10 TR 31

What Effect Has The Status of The Record?

There was no reply to the Amended or Original Petition filed in this cause.

The Sixth Circuit decided in the case of the Chesapeake and Ohio Railway Company vs. Gibson Company, Federal 25,)2nd) 215 in a Removal case that where a petition for removal is not denied it stands admitted.

Masuk vs. Equitable Life Ins. Company, 21 Federal supp., 840 is a case in point.

> "In the absence of plaintiff's denial of the facts alleged by defendant in his petition for removal the facts are admitted."

Bradshaw vs. Bowden, 226 Federal, 327;

Simon vs. Stangel, 54 Federal (2nd) 73;
Kentucky vs. Caleb Powers, 201 U. S., 1.

The above are Removal cases but the ruling seems to be the same where there is a reference to a Three-Judge Court.

In Central Georgia Railroad vs. Wright, 207 U. S., 127. it is decided, that the assessment and levy of a tax is judicial in its nature, and the taxpayer must have an opportunity to be heard after the assessment is made in order that he may contest either invalidity of the assessment or raise any question of fact which he may raise in his own defense against the assessment.

Due process of law adjudicates by notice and a hearing, and if the levy or assessment is made by an officer unauthorized he is denied due process under the 14th Amendment.

Turpin vs. Levin, 187 U. S., 51;
Green vs. Page, 9 Federal Supp., 847;
Royster Euano Co. vs. Virginia, 253 U. S., 412;
Commonwealth vs. Walsh's Trustees, 133 Ky., 112;
Cooley Vol. 1, 394.

Attachment is a distraint proceeding, (Ky. Stat. Section 2306-2307), penalties cannot be collected by distraint.

Fontenot vs. Arcado, 278 Fed., 875.

We therefore, without abandoning any single Assignment of Error or any Point set up in the Record, respectfully submit to the Honorable Judges of this Court that there is a complete denial of Due Process and the Equal Protection of the Laws in the order of the THREE-JUDGE COURT dismissing Appellants Amended Petition for Injunction, and that the issue as made, the default of Appellees considered the Appellants are entitled to a reversal of the said decree of

the said Court for the Eastern District of Kentucky, and in said reversal directions to the Court and for the determination here of all the issues back of and underlying the decree of dismissal.

Respectfully submitted,

HARVEY H. SMITH, Attorney,
SMITH & SCHUBERTH, Counsel,
WILLIAM A. SCHUBERTH, Counsel.
Counsel for Appellants.

—APPENDIX—

Section 122. Laws Repealed. Act March 7th, 1938.

"Chapter 146, Acts of General Assembly of 1934, approved March 17, 1934, being sections 2554-1 to 2554b-96, inclusive, excepting sections 2554b-67, 2554b-73, of Carroll's Kentucky Statutes, 1936 Edition; Chapter VI of the Acts of the General Assembly of 1917, being section 4214c-1 of Carroll's Kentucky Statutes, 1936 Edition; and Chapter V of the General Assembly at the special session of 1933, being sections 4214d-1 to 4214d-14 of Carroll's Kentucky Statutes, 1936 edition, are hereby repealed and all other laws or parts of laws in conflict with the provisions of this Act are hereby repealed to the extent of such conflict."

The Acts of 1934 and 1936 Appellants claim were never existing laws, and the above repealing Act did not comply with the revision section of the Constitution of Kentucky section 51.